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CHARLES ELMORE CRO  
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IN THE

# Supreme Court of the United States

October Term, 1942.

No. **379**

TITLE INSURANCE AND TRUST COMPANY, a corporation,  
*Petitioner,*

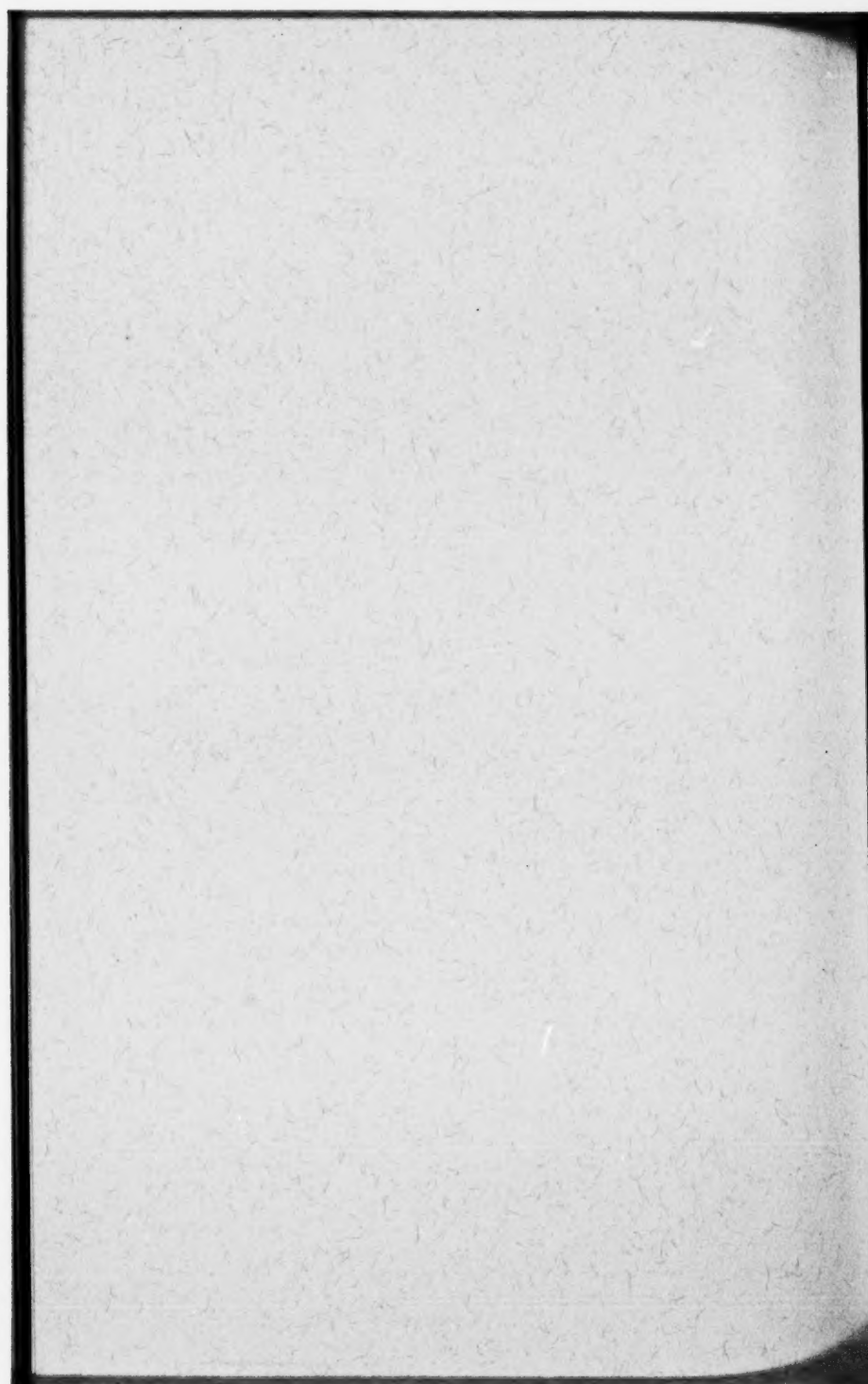
*vs.*

HARRY C. MABRY, as Executor of the Last Will and  
Testament of William J. Garland, Deceased, *et al.*,  
*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO  
THE DISTRICT COURT OF APPEAL OF  
THE STATE OF CALIFORNIA, SECOND  
APPELLATE DISTRICT, DIVISION ONE,  
AND SUPPORTING BRIEF.

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TITLE INSURANCE AND TRUST COMPANY, a corporation,  
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HARRY C. MABRY, as Executor of the Last Will and  
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*Respondents.*

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PETITION FOR WRIT OF CERTIORARI TO  
THE DISTRICT COURT OF APPEAL OF  
THE STATE OF CALIFORNIA, SECOND  
APPELLATE DISTRICT, DIVISION ONE.

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*To the Honorable the Chief Justice, and Associate Jus-  
tices of the Supreme Court of the United States:*

Title Insurance and Trust Company, a corporation, re-  
spectfully petitions that a writ of certiorari issue to review  
the final judgment of the District Court of Appeal of the  
State of California, Second Appellate District, Division  
One, in that certain cause therein entitled "Harry C.  
Mabry, as Executor of the Last Will and Testament of  
William J. Garland, Deceased, Plaintiff and Respondent,  
v. Alzoa Scott, *et al.*, Defendants and Respondents, Title  
Insurance and Trust Company, a corporation, Defendant

and Appellant," being therein numbered Second Civil No. 13,263. Said judgment was entered by said District Court of Appeal April 15, 1942. R. 611. In accord with the provisions of the California Constitution, a petition for hearing in the Supreme Court of California was duly and timely filed with said Supreme Court May 23, 1942, R. 597, and said petition was denied by said Supreme Court June 12, 1942. R. 612. Said District Court of Appeal is the highest court of the state in which a decision of the suit or federal question herein presented could be had, in view of the denial of said petition by said Supreme Court.\*

### Opinion Below.

The opinion of the District Court of Appeal of the State of California in this cause is reported at 51 Adv. Cal. App. 379, and at 124 Pac. (2d) 659, and is set forth in full herein at R. 598.

### Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937. A right and immunity was and is specially claimed by petitioner under the Constitution of the United States. Petitioner claimed in the state courts and claims here a right and immunity under the Fourteenth Amendment to the United States Constitution namely, that the judgment rendered by the State Court, ordering petitioner, as trustee,

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\*California Constitution, Art. VI, §§ 1, 4, 4-a, 4-b, 4-c (Calif. Stats. 1929, XX-XXIV). See Appendix.

*American Railway Express Company v. Levee* (1923), 263 U. S. 19, 20-21.



to pay \$120,000 out of the corpus of a trust, which corpus belonged entirely to unborn and unascertained remaindermen who were not before the court, actually or by virtual representatives, and who therefore, were not and could not be bound by the judgment in this case, would be and was violative of the due process guaranties of said Fourteenth Amendment. This claim was denied by the District Court of Appeal of the State of California. R. 603, 611.

This petition is made pursuant to paragraph 5(a) of Rule 38 of the Rules of this Court, which provides for the granting of a writ of certiorari where a state court has decided a Federal question of substance probably in a way not in accord with the applicable decisions of this Court. Petitioner, in seeking this review, relies, among other decisions, on the recent decisions of this Court in *Hansberry v. Lee* (1940), 311 U. S. 32, and *Riley v. New York Trust Co.*, ..... U. S. ...., 86 L. ed. 551, 558. (Concurring opinion.)

The case sought to be reviewed herein involves a decision of an important question of law relating to the application of the doctrine of virtual representation to a purported "compromise" of litigation between living beneficiaries of a trust wherein the validity of the trust was attacked. By said "compromise" a large part of the corpus (\$120,000) belonging entirely to unascertained and absent remaindermen, is ordered to be paid by petitioner presently to certain of the life beneficiaries, who are seeking the enforcement of said "compromise." The decision of the District Court of Appeal below is probably in conflict with the decision of this Court in *Hansberry v. Lee*, *supra*.

### Questions Presented.

1. Consistent with due process of law, may the interests of unborn or presently unidentified remaindermen be adversely affected by a decree approving an agreement for compromise of pending litigation attacking a trust, which agreement provides for the withdrawal of \$120,000 from the corpus, belonging solely to such remaindermen, and the immediate payment thereof to certain of the living income beneficiaries, where the interests of such remaindermen are not before the court, either actually or through representation?

2. Consistent with due process of law, in a proceeding for court approval of such "compromise" agreement, could the absent remaindermen be virtually represented by the living income beneficiaries who had no possible interest in the corpus and each of whom reasonably expected to gain largely through the "compromise" at the expense of the absent remaindermen?

3. Consistent with due process of law, could said absent remaindermen be represented in said proceeding by a purported "guardian *ad litem*" selected by the plaintiff in the action and purportedly appointed by an *ex parte* order made without notice to any one, where the interests of said remaindermen were not subjected to the jurisdiction of the court by any other means?\*

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\*Under California statutes guardians *ad litem* can be appointed for minors or incompetents only after such minors or incompetents have been first duly served with process. *Akley v. Bassett*, (1922), 189 Cal. 625. The sole exception to this rule is in a proceeding *in rem* for the registration of title to land under the Torrens Land Law, where there has first been a "seizure" of the *res* by the filing and recording of a *lis pendens*. The Article in question (Deering's Genl. Laws, Calif. Art. 8589, §13) provides as follows:

4. Consistent with due process of law, were said absent remaindermen adequately represented in said proceeding by the presence of the Trustee, where the interests of each class of the living beneficiaries were opposed to and in conflict with the interests of all the other living beneficiaries, and the interests of all the living beneficiaries were opposed to and in conflict with the interests of all of the absent remaindermen?

On the other hand, if the Trustee should be held to have represented the remaindermen, did not its refusal to consent to the "compromise" deprive the court of authority to approve same?

#### Summary Statement of Matter Involved.

William J. Garland, now deceased, created the trust in question in 1931. R. 91. As of the date of the compromise proceedings in 1939, the trust corpus had a value of approximately \$1,200,000. R. 537. The income beneficiaries were Alzoa (Garland) Scott, Garland's then wife, entitled to an income of \$1,250 for life; the four minor children of their marriage, entitled to income (payable to Alzoa for their benefit) on a sliding scale of from \$500 per month to \$1,250 per month, for a period of twenty years only; and, lastly, Garland, the settlor, entitled to any balance of the income for life with remainder therein to the issue of Garland and Alzoa *per stirpes*. R. 75-78.

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—Continued from previous page

*"Appointment of Guardians:* \* \* \* Upon the petition of applicant or of any person interested in the proceedings, the court shall appoint a disinterested person to act as guardian *ad litem* for minors and other persons under disability and for all persons not in being who may appear to have any interest in or lien upon the land. \* \* \*

The trust was to terminate upon the death of the survivor of Garland, Alzoa and the four children. R. 80-81. Thereupon the corpus was to be distributed (a) to the then issue of Garland and Alzoa, *i. e.*, *unborn grandchildren*, and surviving spouses of such issue, or (b) in default thereof, to the heirs at law of Garland under the laws of California then in effect. R. 81-82.

No person now living or ascertained has any interest in the corpus of this trust.

In 1936, Garland sued (*inter alia*), Alzoa, the four children, and this petitioner, as trustee, to set aside the trust on the ground of asserted misrepresentations by Alzoa. R. 98. These allegations were denied by all defendants. R. 175; 295.

In 1938 Garland amended his complaint, and, in the alternative, prayed that the trust instrument be "revised, modified and reformed" on the ground of mistake in the very particulars in which the trust was later ostensibly modified as a result of the "compromise." R. 337. The allegations of the amendment were denied by all defendants. R. 394; 408; 415.

In August, 1939, a petition to compromise the action was filed. R. 540. Said petition alleged that a written agreement had been entered into between Garland and Alzoa. R. 550. Abandoning their defenses to plaintiff's claims, all the living beneficiaries joined in the petition to compromise, thus aligning themselves with the plaintiff as against the interests of the unborn, and joined in the petition. R. 540-541. In addition, Garland petitioned the Court for the appointment of a guardian *ad litem* for the unborn grandchildren and an order purporting to appoint such guardian *ad litem* was entered *ex parte*. R. 574; 578.

This petitioner, as trustee, has at all times refused to join in or consent to said compromise. R. 566; 533-534.

The effect of the "compromise" was to give plaintiff the full relief prayed for in his amendment to the complaint.

The features of the modification of the trust contemplated by the compromise [R. 550-553] were as follows:

1. \$60,000 of the corpus (property of the unascertained remaindermen) was forthwith to be paid out to Garland;
2. A like \$60,000 out of corpus was to be paid over to Alzoa;
3. In lieu of \$1,250 per month to Alzoa, she was to receive  $37\frac{1}{2}\%$  of the net income for life with remainder over to the four minor children;
4. In lieu of a graduated scale of income for the benefit of the four children for a period of twenty years (less than twelve years of which remained), the compromise secured to them a vested interest outright in  $25\%$  of the net income of the trust for their respective lives, with remainder over to their issue.
5. In lieu of rights during his life to the balance of income after Alzoa and the children, Garland, the settlor, was to receive  $37\frac{1}{2}\%$  of the net income of the trust for himself or his assigns during the entire term of the trust, probably about sixty years.

Otherwise the original provisions of the trust were left undisturbed. R. 550-551.

Believing that the interests of the unrepresented unborn were being vitally and substantially affected by the diversion of \$120,000 of corpus to the settlor and the living beneficiaries, petitioner as trustee, not only in order to oppose the imposition upon it of a personal liability through a void judgment but also as a matter of duty to absent beneficiaries (*Gray v. Union Trust Co.*, 171 Cal. 637, 639), appeared and opposed [R. 566] and has continued to oppose the proposed settlement and to contest the Court's power to order the trustee to make payments out of corpus as provided thereby.

After hearing and argument, the trial court approved the compromise and entered its decree authorizing the same and directing the trustee to pay out said \$120,000. R. 516. Thereupon petitioner, trustee, took its appeal. R. 533-534. The District Court of Appeal rendered its decision affirming the order of the trial court. R. 598, 611. Thereafter petitioner applied to the Supreme Court of the State of California for a hearing after decision by the District Court of Appeal, which was denied. R. 612. In the trial court, in the District Court of Appeal and on petition in the Supreme Court, petitioner has raised the federal constitutional question at each stage of the case. The opinion of the District Court of Appeal expressly passes upon that question. R. 603.

### Specification of Errors.

The District Court of Appeal erred:

1. In holding that the unborn and unascertained remaindermen were virtually represented by the life beneficiaries who received substantial benefits from the compromise agreement at the expense of those claimed to be represented.

2. In holding (if it did so hold) that petitioner, as trustee, represented the unborn and unascertained remaindermen even though the trustee refused at all times to consent to the compromise.

3. In holding (if it did so hold) that a so-called "guardian *ad litem*" for the unborn and unascertained remaindermen, appointed *ex parte* and without statutory or other authority therefor upon the petition of the plaintiff, William J. Garland, in the rescission and reformation suit (wherein said plaintiff was the instigator of and a party to said compromise agreement and was one of the petitioners seeking the approval thereof), was the representative of the unborn and unascertained remaindermen with authority to bind them to this compromise agreement.

4. In holding that the doctrine of virtual representation may be applied, consistently with due process of law, to a "compromise" of pending litigation (rather than a *defense* of such litigation) where the compromise involves the withdrawal of \$120,000 of corpus belonging to those claimed to be virtually represented and which sum is to be given immediately to certain of the parties seeking to enforce the compromise.

**Reasons for Granting the Writ.**

1. The decision of the District Court of Appeal, holding that the unascertained remaindermen are bound by the compromise under the doctrine of virtual representation, despite the adverse interests of those claimed to be the representatives, is in conflict with decisions of this Honorable Court on that subject.

2. The decision of the District Court of Appeal is not consistent with, and does not afford either the unascertained remaindermen or this petitioner the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Petitioner respectfully represents that said questions properly appear in the record and were raised before the trial court and the District Court of Appeal and involve questions of great importance in the proper administration of trust law.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the Seal of this Honorable Court directed to the District Court of Appeal of the State of California requiring said court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said District Court of Appeal in the case numbered Second Civil No. 13,263 and entitled "Harry C. Mabry, as Executor of the Last Will and Testament of William J. Garland, Deceased, Plaintiff and Respondent, v. Alzoa Scott *et al.*, Defendants and Respondents, Title Insurance and Trust



Company, a corporation, Defendant and Appellant," to be reviewed and determined by this Honorable Court as provided by law; that the judgment of said District Court of Appeal herein be reversed by this Honorable Court; and for such further relief as to this Court may seem proper.

Dated: September 3, 1942.

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